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February 22, 2019

The Honorable Elijah E. Cummings
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515-6143

Dear Mr. Chairman:

Thank you for your letter of February 15, 2019. Please accept this response on behalf of the Trump Organization (the "Trump Organization" or the "Company").

I begin by expressing concern that, according to recent media reports, long-time Kramer Levin partner and Litigation Co-Chair, Barry H. Berke, has been engaged as Special Oversight Counsel to the Majority Staff of the U.S. House Committee on the Judiciary (the "House Judiciary Committee").

On February 12, 2019, Chairman Nadler issued a press release announcing that his Committee had retained Mr. Berke "on . . . matters related to the Department of Justice, including the Department's review of Special Counsel Mueller's investigation, and other oversight and policy issues." Press Release, Chairman Nadler Announces Special Oversight Counsels to House Judiciary Committee Staff (Feb. 12, 2019). These are subjects on which both the House Judiciary Committee and your Committee are working together closely. In fact, a recent joint press release strongly suggests coordination and collaboration between your Committees. *See, e.g.*, Joint Press Release, House Chairmen Issue Warning After President's Statements on Cohen Testimony (Jan. 13, 2019), <https://judiciary.house.gov/news/press-releases/house-chairmen-issue-warning-after-president-s-statements-cohen-testimony>; Press Release, Nadler & Cummings Release Joint Statement on Comey Interview (Dec. 7, 2018) (summarizing statements of Former FBI Director James Comey regarding the Department of Justice and the Special Counsel's investigation following a joint interview by the committees). Further, on September 27, 2018, the Judiciary and

Oversight Committee ranking members (Rep.'s Nadler and Cummings) issued a joint response to a subpoena from the House Judiciary Committee (majority).

These circumstances raise significant and problematic ethical issues. The Trump Organization is both an existing and longstanding client of Mr. Berke's law firm. Indeed, the Company and its principals have been clients of Kramer Levin for more than a quarter of a century. See www.kramerlevin.com/people/JayNeveloff ("Donald Trump and The Trump Organization have also been clients for more than 25 years in innumerable real estate matters, including Trump Tower, 40 Wall Street, Trump Palace, Trump International in New York and Chicago, the GM Building, the Plaza Hotel and numerous other matters."). During the course of their relationship, Kramer Levin has represented the Trump Organization with respect to virtually every aspect of its business. For many years, Kramer Levin even served as the Company's primary outside counsel. Kramer Levin attorneys continue to represent the Company and provide legal advice on important and highly sensitive business matters to this very day.

We are concerned that Mr. Berke, or individuals acting at his direction or upon his advice, are directing, advising, supervising, conferring with or influencing your Committee. This would not only violate recognized ethical obligations but taint your Committee's work. Mr. Berke's assistance investigating matters involving the President when he was a private citizen (and a Kramer Levin client), as well as the Trump Organization (an existing Kramer Levin client), and its executives, raises significant legal concerns that cannot be ignored. These issues must be investigated and fully resolved by all parties before the Trump Organization can be requested to furnish information to the Oversight Committee. In short, Mr. Berke's assistance to the House Judiciary Committee, and its overlap with or influence on this Committee's investigation, cannot be squared with Kramer Levin's longtime and ongoing representation of the Company and its principals. Such adverse advocacy violates basic ethical precepts that govern the legal profession and creates an irreconcilable conflict of interest.

Under Rule 1.7(a) of the New York Rules of Professional Conduct, "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." *Id.* The Rules define "differing interests" as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Rule 1.0(f). Rule 1.7(a) applies even if the matters the attorney is working on for the respective clients "are wholly unrelated." Comment [6] to Rule 1.7; see also *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 210, 214 (2d Cir. 2010) (to avoid disqualification for a concurrent conflict, "it will not suffice to show that the two matters upon which an attorney represents existing clients are unrelated"); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) ("The propriety of this conduct must be measured...as against the duty of undivided loyalty which an attorney owes to each of his clients."). The Rules further provide that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 [.] Rule 1.10.

Consistent with this precedent, the United States Court of Appeals for the Second Circuit has observed that concurrent, simultaneous representation, of one existing client in a matter adverse to another existing client, even by a large national law firm, is “prima facie improper” and warrants disqualification. *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d at 209 (disqualifying Blank Rome, LLP from representing an adverse party), *citing Cinema 5*, 528 F.2d at 1387. Stated another way, when the representation is concurrent, an attorney faces a conflict regardless of whether the representations are “substantial[ly] relat[ed].” *Cinema 5*, 528 F.2d at 1386. *See also CQS ABS Master Fund Ltd. v. MBIA Inc.*, 2013 WL 3270322, *8 (S.D.N.Y. June 24, 2013) (disqualification of White & Case LLP from representing opposing party was appropriate “when the challenged attorney is concurrently representing adverse interests so that the attorney’s vigor in pursuing one of them may be questioned.”) (internal citation omitted).

Any suggestion that Mr. Berke is acting for the House in an individual capacity, rather than as a Kramer Levin partner, is unavailing. Mr. Berke has published numerous articles about The Trump Organization, all calling for the prosecution and impeachment of the President – and all citing prominently Mr. Burke’s role as “co-chair of the litigation department of Kramer Levin Naftalis & Frankel LLP.” *See Did Trump Obstruct Justice?* Barry H. Berke, Noah Bookbinder and Norman J. Eisen, *The New York Times*, Jan. 5, 2018; *Presidential Obstruction of Justice: The Case of Donald J. Trump*, Norman J. Eisen, Barry H. Berke and Noah Bookbinder, August 22, 2018, www.brookings.edu. When he agreed to act as counsel for your sister committee, Mr. Berke continued to identify himself (and authorize himself to be identified by others) as an active partner in Kramer Levin. *See Top GOP Rep Demands Answers After Dems Hire Anti-Trump Investigator For Judiciary Committee*, www.foxnews.com (“Berke, a litigation partner at the international law firm Kramer Levin, is based in New York City, and will commute four days per week to work for the Democrats on the Judiciary Committee”). Finally, Kramer Levin’s website continues to describe Mr. Berke as “a member of the firm’s Executive and Planning Committees and co-chair of the Litigation department.”

For the reasons set forth herein, before the Trump Organization can be asked to provide information to your Committee, we must carefully examine and fully resolve the extent and degree to which Mr. Berke, his staff, or anyone affiliated with him, is involved in matters that this Committee is investigating. In furtherance of this inquiry, we respectfully request that we be provided the following information in writing:

- Copies of any and all e-mails, text messages, memoranda or other hard copy or electronic communications by and between Mr. Berke and/or any lawyer working with Mr. Berke, on the one hand, and any member, staff member, lawyer, or other agent or person acting in any capacity whatsoever on behalf of your Committee, on the other;
- Telephone records showing any and all contact between Mr. Berke and/or any lawyer working with Mr. Berke, on the one hand, and any member, staff member,

lawyer, or other agent or person acting in any capacity whatsoever on behalf of your Committee, on the other;

- Copies of all work product of any kind and description whether in the form of email, memoranda, letters, papers, or memorialized in any other electronic or paper format, including but not limited to, legal or strategic thoughts or analysis, legal precepts, strategic ideas, legal or historical precedent and factual analysis or description, created in whole or in part by Mr. Berke or any lawyer working with Mr. Berke, that is in the possession of your Committee.

We have other concerns and corresponding responses to your letter of February 15, 2019, but the fundamental ethical issue raised in this letter must be carefully investigated and resolved before the Committee's requests can be addressed. The Trump Organization has cooperated with numerous requests for information for almost two years. The circumstances outlined in this letter are unique in our experience and, we expect, in yours as well. We look forward to receiving the requested information.

Respectfully yours,


Alan S. Futerfas

cc: The Honorable Jim Jordan, Ranking Member